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State of Utah v. Joseph C. Valdez : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and
Appellee,

vs.

JOSEPH C. VALDEZ,

Defendant and
Appellant.

Case No. 900427-CA

Category 2

APPELLANT'S BRIEF

Appeal from the conviction of June 28, 1990, in the Third Circuit Court in and for Tooele County, the Honorable Edward A. Watson, presiding, of the crime of Driving or Being in Actual Physical Control of a Motor Vehicle while Under the Influence of Alcohol, in violation of Section 41-6-44 U.C.A., 1953.

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JURISDICTION OF THE COURT OF APPEALS

Section 78-4-11 Provides that the Court of Appeals shall hear all appeals from the Circuit courts:

> Except as otherwise directed by Section 78-2-2, appeals from final civil and criminal judgments of the circuit courts are to the Court of Appeals. . . . .

None of the exceptions listed in Section 78-2-2 U.C.A., 1953, apply to this case.

STATEMENT OF THE ISSUES

POINT ONE

THE STATE FAILED TO CARRY ITS BURDEN OF PROOF THAT DEFENDANT COULD NOT DRIVE SAFELY BECAUSE OF INTOXICATION

POINT TWO

THE COURT ERRED IN DENYING DEFENDANT A JURY TRIAL

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of counsel for his defense.

Utah State Constitution, Article I, Section 10: In capital cases the right to trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Utah State Constitution, Article I, Section 12: In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. the accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

41-4-44 U.C.A., 1990: (1) (a) It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this state if the person has a blood or breath alcohol concentration of .08 grams or greater as

shown by a chemical test given within two hours after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) Every person convicted the first time of a violation of Subsection (1) is guilty of a class B misdemeanor. But if the person has inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner, he is guilty of a class A misdemeanor.

(b) In this section, the standard of negligence is that of simple negligence, the failure to exercise the degree of care which an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) In addition to any penalties imposed under Subsection (3), the court shall, upon a first conviction impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(5) Upon a second conviction within six years under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) the court shall, in addition to any penalties imposed under Subsection (3), impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol

rehabilitation facility. The court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility.

(6) (a) A third or subsequent conviction within six years under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) is a:

(i) class B misdemeanor if one or both of the prior convictions is for an offense committed prior to April 23, 1990; and

(ii) class A misdemeanor if both of the prior convictions are for offenses committed after April 23, 1990.

(b) (i) Under Subsection 6(a)(i) the court shall, in addition to any penalties imposed under Subsection (3), impose a mandatory jail sentence of not less than 720 nor more than 2,160 hours, with emphasis on serving in the drunk tank of the jail.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours.

(iii) In addition to the jail sentence or work in the community-service work program, the court shall order the person to obtain treatment at an alcohol rehabilitation facility.

(c) (i) Under Subsection 6(a)(ii) the court shall, in addition to any penalties imposed under Subsection (3), impose a fine of not less than $1,000, and also a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours, with emphasis on serving in the drunk tank of the jail.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence. Enrollment in and completion of a chemical dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long term closely supervised follow through after the treatment.

(iii) In addition to the jail sentence or work in the community-service work program, the court shall order the person to obtain treatment at an alcohol rehabilitation facility.

(7) (a) A fourth or subsequent conviction within six years under this section is a third degree felony if all three prior convictions are for offenses committed after April 23, 1990.

(b) The court shall, in addition to any penalties imposed under Subsection (3), impose a fine of not less than $1,000, and also a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours, with emphasis on serving in the drunk tank of the jail.

(c) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence. Enrollment in and completion of a chemical dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after treatment.

(d) In addition to the jail sentence or work in the community-service work program, the court shall order the person to obtain treatment at an alcohol rehabilitation facility.

(8) No portion of any sentence imposed under Subsection (3) may be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) may not be terminated and the department may not reinstate any license suspended or revoked as a result of the conviction, if it is a second or subsequent conviction within six years, until the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution and rehabilitation costs, assessed against the person, have been paid.

(9) (a) The provisions of Subsections (4), (5), (6), and (7) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol rehabilitation facility; obtain, in the discretion of the court, treatment, at an alcohol rehabilitation facility; obtain, mandatorily, treatment at an alcohol rehabilitation facility; or do any combination of those things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior offense under Subsection (10). The court shall render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior offense under Subsection

(10), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections 41-6-44 (4), (5), (6) and (7).

(b) For purposes of determining whether a conviction under Section 41-6-45 which qualified as a prior conviction under Subsection (10), is a first, second, or subsequent conviction under this subsection, a previous conviction under either this section or Section 41-6-45 is considered a prior conviction.

(c) Any alcohol rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.

(10) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted under Subsection 41-6-43(1) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there has been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement is an offer of proof of the facts which shows whether there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows. If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction is a prior offense for the purposes of Subsections (5), (6), and (7).

(11) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(12) The Department of Public Safety shall suspend for 90 days the operator's license of any person convicted for the first time under Subsection (1), and shall revoke for one year the license of any person convicted of any subsequent offense under Subsection (1) if the violation is committed within a period of six years from the date of the prior violation. The department shall

subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 41-2-130, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

77-1-6 Utah Code Annotated, 1980: (1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;
(b) To receive a copy of the accusation filed against him;
(c) To testify in his own behalf;
(d) To be confronted by the witnesses against him;
(e) To have compulsory process to insure the attendance of witnesses in his behalf;
(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;
(g) To the right of appeal in all cases; and
(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;
(b) No accused person shall, before final judgment, be compelled to advance money for fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;
(c) No person shall be compelled to give evidence against himself;
(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and
(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Rule 17, Utah Rules of Criminal Procedure, The Trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impanelled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides of the argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(j) At each recess of the court, whether the jurors are permitted to separate or be sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty

not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, expect depositions; and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the sate of their deliberations or the verdict agreed upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a criminal conviction on June 28, 1990, in the Third Circuit Court, Tooele City Department, the Honorable Edward A. Watson, Circuit Judge presiding, following a bench trial of the defendant for the charge of Driving or Being in Actual Physical Control of a Motor Vehicle While Under the Influence of Alcohol, or Under the Influence of Drugs or a Combination of Alcohol and Drugs to a Degree that the Defendant Could not Drive Safely, in violation of Section 41-6-44 Utah Code Annotated, 1953, as amended, 1990.

Course of Proceedings

The Defendant was given a citation for Driving Under the Influence at the time of his arrest on February 17, 1990. He was arraigned by the Circuit Court on March 8, 1990. The trial was set at the time of the Arraignment for March 29, 1990. At the time of trial, defendant appeared with counsel, Franklin L. Slaugh, who moved for a continuance on the grounds that he had only had four days to prepare, and had not yet interviewed important defense witnesses, or seen the reports of the investigating and arresting officers (Motion to Continue Transcript, p. 2, lines 12-19). The trial was continued to April 23, 1990, on the condition that it be a bench trial, and that defendant waive his jury demand (Motion to Continue Transcript, p. 3, lines 15-20; p. 5, lines 1-7). The

trial was held as scheduled, and the Court found the defendant guilty of being in actual physical control of a motor vehicle, and dismissed count II, driving on Suspension or Revocation, having found that the defendant had not driven the vehicle in question (Trial Transcript p. 37, lines 18-21; p. 38, lines 9-13). Defendant was to have been sentenced on May 21, 1990, but the presentence report was not prepared as requested by the Court. The defendant also asked that Attorney Slough resign, and a public defender be appointed to represent him (Sentencing Transcript, p. 5, lines 10-13) The Court granted the request, appointing Attorney Alan K. Jeppesen to represent the defendant further, and continued the sentencing until June 8, 1990 (Sentencing Transcript p. 6, lines 13-25).

Disposition of Trial Court

The trial judge sentenced the Defendant to one year in the Tooele County Jail, and to pay a fine of $1,400.00, including surcharges and assessments. He suspended the imposition of sentence and placed the defendant on probation on certain conditions. The Sentence was entered on June 28, 1990, and the Defendant filed his appeal on July 27, 1990.

Relevant Facts

Defendant was arraigned on March 8, 1990. He informed the Court at the time of arraignment that he had an appointment with Attorney Frank Slaugh on March 24, 1990, and wanted to wait to enter a plea after talking to Attorney Slaugh. (Arraignment Transcript, p. 4, lines 1-20). The Court entered a plea of not guilty, and set the matter for trial on March 29, 1990, less than ten days

after the Defendant's appointment with his attorney (Arraignment Transcript, p. 6, lines 3-18). When Attorney Slaugh appeared for the Defendant on March 29, 1990, he asked for a continuance, because he had not yet been able to examine the Defendant's witnesses, or prepare for trial (Motion to Continue Transcript, p.2, lines 12-24). The Court continued the trial, but with the understanding that it would be a bench trial, because the defendant had not filed a timely Jury Demand (Motion to Continue Transcript, p. 3, lines 15-20; p. 5, lines 1-6).

When the matter came before the court for Trial, the prosecution's witness, Paul Shelton, who was the arresting officer, (Trial Transcript, p. 15, lines 24-25), testified that he could not specifically recall whether there was a wooden frame around the bed of truck or not (Trial Transcript, p. 10, lines 12-22). This evidence was important in determining whether the officer knew who was driving the pickup when he observed what he thought was an erratic driving pattern.

The defendant called the passenger, Larry Lenzing, who testified that he was driving the pickup when the officer pulled him over (Trial Transcript, p. 21, lines 17-25; p. 22, lines 19-20; p. 23, lines 8-13). He also testified that there was a plywood frame around the bed of the truck, and the windows and rear view mirrors were dirty, so the officer could not have seen into the cab of the truck to determine whether the two occupants traded places (Trial Transcript, p. 24, lines 5-10). Upon the presentation of that evidence, the Defendant rested his case. (Trial Transcript, p. 27, line 8).

On rebuttal, the State recalled Officer Shelton, who testified it did not take him very long to reach the driver's window after the pickup stopped (Trial Transcript, p. 29, lines 5-11). He also said he could remember two people

looking back at him from the cab of the truck as he pulled it over (Trial Transcript p. 30, lines 2-6) and limited his lapse of memory regarding the plywood frame, to just the sides of the bed.

Defendant called a surrebuttal witness, Mindy Argyle, (Trial Transcript, p. 31, lines 4-16), who testified that on the date of the defendant's arrest, she had driven the pickup truck and it had the plywood sides on both sides and the front of the bed of the truck (Trial Transcript, p. 32, lines 13-16).

The State's evidence of intoxication to a degree that the defendant could not drive safely, was the following:

(1) The officer observed the vehicle weave across a yellow center line during the mile and one half that he followed it (Trial Transcript p. 6, lines 18-20).

(2) The vehicle slowed down to "quite a slow speed and then it proceeded to pick the speed back up for about a mile" (Trial Transcript p. 6, lines 20-22).

(3) The vehicle crossed over the outside white traffic lane as it went around a curve towards the interstate highway (Trial Transcript, p. 8, lines 6-9).

(4) The odor of alcohol was observed on defendant's breath when the officer approached the vehicle, (Trial Transcript, p. 11, lines 12, 16-19).

(5) The defendant's speech was slurred. (Trial Transcript p. 11, line 12).

(6) The defendant could not find his driver's license or registration (Trial Transcript, p. 11, lines 13-14).

(7) Defendant admitted to having had a few beers, (Trial Transcript p. 11, line 25, p. 12, lines 1-3.

(8) The defendant lost his balance on the third and ninth steps of a heel to toe test (Trial Transcript p. 14, lines 26).

(9) He did not count in sequence, and lost his balance on a one leg stand test (Trial Transcript p. 14, lines 21-25).

(10) He miscounted or "couldn't get his right fingers together." on a finger count test (Trial Transcript, p. 15, lines 4-8).

The trial judge found the defendant guilty of being in actual physical control of a motor vehicle while under the influence of alcohol (Trial Transcript p. 37, lines 6-25; p. 38, lines 1-8). He found the defendant not guilty of Driving on Suspension, because reasonable doubt existed as to whether the defendant was driving or not (Trial Transcript, p. 38, lines 9-13).

SUMMARY OF DEFENDANT'S ARGUMENT

Point One

The State failed to prove beyond a reasonable doubt each element of the crime of D.U.I., because it failed to prove that the defendant was under the influence of alcohol. While the driving pattern may have given the officer probable cause to stop the defendant's vehicle, he was not the driver, and that same driving pattern is not admissible to prove he was intoxicated to a degree he could not drive safely. There was no evidence of blood alcohol at the time of driving. The only evidence upon which to base the defendant's conviction is his physical characteristics and performance of the field sobriety tests.

Point Two

The defendant submits as a second ground of reversal that his fundamental, constitutional right to a trial by jury[1] was denied him. Forcing defendant to waive that right because the Jury Demand was not timely, was in this instance, improper, because the Court was well aware that defendant's appointment with counsel was less than ten days before the date the Court set for trial. The trial was set at the time of the arraignment, and the Court knew when it set the trial from the bench that the defendant's attorney would have less than ten days to prepare for trial after the initial conference (Arraignment Transcript p. 6, lines 3-7). Defendant's counsel was then in a position wherein he was unprepared for trial on the date set, and was told by the prosecutor that the only way he could get a continuance was to waive the jury demand (Motion to Continue Transcript p. 3, lines 15-20).

[1]See f.n. 6, State v. Moosman, 794 P.2d 474 (Utah Sp.Ct., 1990): "U. S. Const. amend. VI; Utah Const. art. I, Section 10; see generally Duncan v. Louisiana, 391 U.S. 145 (1968); Mel Hardman Productions, Inc. v. Robinson, 604 P.2d 913 (Utah, 1979); State v. James, 30 Utah 2d 32, 512 P.2d 1031 (Utah, 1973); Flynn v. W. P. Harlin Constr. Co., 29 Utah 2d 327, 509 P.2d 356 (1973).

DETAIL OF ARGUMENT

POINT ONE

THE STATE FAILED TO CARRY ITS BURDEN OF PROOF TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COULD NOT DRIVE SAFELY BECAUSE OF INTOXICATION

In order for defendant to prevail on the argument that the State failed to carry its burden of proof of intoxication to a degree that the defendant could not drive safely, the evidence must be so insubstantial or inconclusive that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime charged.[2] This case is not one of contradictory testimony on the point of defendant's intoxication to a degree that he could not drive safely, as in *State v. Carlson*,[3] it is a case in which convincing evidence of intoxication to a degree that the defendant could not drive safely, was wholly lacking.

None of the evidence presented was persuasive of the defendant's inability to safely drive.

> A basic rule with respect to conviction of crime is that there must be some basis in the evidence upon which the fact trier (court or jury) could fairly and reasonably believe that the state had proved every essential element of the offense beyond a reasonable

[2] State v. Dyer, 671 P.2d 142, 148-149 (Utah Sp.Ct., 1983).

[3] 638 P.2d 512, 514 (Utah, Sp. Ct., 1981): "The presentation of conflicting evidence does not preclude a finding of guilt beyond a reasonable doubt."

> doubt; and unless that test is met, a conviction is not justified.[4]

The defendant cannot be convicted of D.U.I. on his admission of the consumption of alcohol, nor upon his slurred speech. It was almost midnight when he was arrested. There is nothing to suggest the slurred speech was the result of alcohol consumption. Furthermore, there is nothing to suggest that the defendant could not drive safely simply because he lost his balance on the third and ninth steps while walking heel to toe, or in failing to touch each finger correctly while counting. There was no breath test, no blood test, no driving pattern to determine the defendant's level of intoxication, and the field sobriety tests simply do not overcome the burden of the State on the element of intoxication to a degree the defendant could not drive safely. In light of the insubstantial evidence on the intoxication to a degree that the defendant could not drive safely element of the D.U.I. charge, the State failed to carry its burden of proof and the defendant should have been acquitted.

POINT TWO

THE COURT ERRED IN DENYING DEFENDANT A JURY TRIAL

Rule 17(d) of the Rules of Criminal Procedure provides that a defendant has no right to a jury trial unless he makes a request for a jury at least ten days before the trial date.[5] The trial court abused its discretion in setting the trial within that ten day period when the court knew in advance that the defendant's

[4] State v. Granato, 610 P.2d 1290, 1292 (Utah, 1980).

[5] Formerly 77-35-17 U.C.A., 1953. "All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. . . . "

counsel would not have ten days to make a demand (Arraignment Transcript p. 6, lines 3-18). When the Court continued the trial at the defendant's counsel's request, it should have reinstated his request for a jury, which he had apparently filed prior to trial.[6]

CONCLUSION

The defendant was not guilty of being intoxicated to a degree that he could not drive safely. When the Court found that he was not the driver of the vehicle, the evidence of erratic driving was irrelevant as to defendant's intoxication. His performance of the field sobriety tests and his physical characteristics were not convincing beyond a reasonable doubt that he was intoxicated to the degree he could not drive safely. His conviction should be reversed and he should be acquitted of the crime of D.U.I.

When the court continued the trial to June 8, 1990, it should have honored the Defendant's request for a jury. To deny him that constitutionally guaranteed right was a deprivation of a constitutional right so fundamental as to require a reversal of the defendant's conviction.

Respectfully submitted,

Alan K. Jeppesen
Attorney for Defendant

[6] Mel Hardman Productions, Inc., 604 P.2d 913, 917 (Utah Sp.Ct., 1979). "As we have numerous times indicated, the right to trial by jury is one which should be carefully safeguarded by the courts, ... "

CERTIFICATE OF MAILING

I hereby certify that I caused four copies of the foregoing Brief of Appellant to be mailed, postage prepaid this 13 day of December, 1990, to Ronald L. Elton, Tooele County Attorney, 47 South Main Street, Tooele, Utah 84074, and Joseph Valdez, P. O. Box 250, Draper, Utah 84020.